

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

SEP 16 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0201-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ROGER DALE CLARK,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200601309

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Hock Law Group
By Larry Magid

Phoenix
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Following a jury trial, petitioner Roger Dale Clark was convicted of two counts of child molestation and three counts of sexual conduct with a minor under the age of fifteen. The trial court sentenced him to consecutive and concurrent sentences totaling seventy-seven years. We affirmed Clark's convictions and sentences on appeal. *State v.*

Clark, No. 2 CA-CR 2007-0135 (memorandum decision filed Aug. 14, 2008). Clark then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., raising numerous claims of ineffective assistance of trial counsel. The trial court summarily denied relief on some of the claims, and denied relief on the others following an evidentiary hearing. This petition for review followed. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 In order to state a claim of ineffective assistance of counsel, a defendant must establish that counsel’s performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A trial court is required to conduct an evidentiary hearing only when a colorable claim has been presented, “one that, if the allegations are true, might have changed the outcome” of the case. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶3 Clark argues, as he did in his petition below, that trial counsel was ineffective for failing to: 1) inform him of the state’s plea offer; 2) present rebuttal witnesses; 3) call material and character witnesses; 4) object to the state’s opening statement; 5) request a different judge; 6) move the court to preclude Darlene Clark’s testimony; and 7) address the state’s failure to preserve exculpatory evidence. He asks this court to grant him a new trial. The trial court rejected claims four through seven but

found that Clark was entitled to an evidentiary hearing on claims one through three. Clark and trial counsel testified at the hearing, which took place in December 2009 and February 2010. The court denied post-conviction relief on the claims presented at the hearing in an April 2010 minute entry order that clearly identified the arguments addressed and correctly ruled on them in a manner that will allow this court and any future court to understand their resolution. We therefore approve and adopt the trial court's ruling as to claims one through three above, and find no purpose would be served in setting forth the order in its entirety in this decision.¹ *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶4 With respect to claims four through seven, Clark has not acknowledged the trial court's ruling and established how the court erred. Instead, with the exception of a few paragraphs, his petition for review reasserts, word-for-word, his petition for post-conviction relief. We additionally note that Clark did not attach an affidavit or any other supplemental evidence to support the allegations in his petition. *See Ariz. R. Crim. P.* 32.5. (“Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it.”).

¹In its April 2010 ruling the trial court incorrectly noted Clark could have raised “many of the grounds alleged” in claims four through seven on appeal. However, claims of ineffective assistance of counsel must be brought in a post-conviction proceeding pursuant to Rule 32, not on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). We nonetheless agree with the court's ruling denying relief on these claims because none of them, as presented, was colorable. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court “if the result was legally correct for any reason”).

¶5 Clark contends trial counsel should have objected when, “at some point during its opening statement,” the state called him a “child molester.” In summarily denying relief on this claim, the trial court found Clark had not presented a colorable claim of ineffective assistance of counsel. Because Clark did not provide any citation to the record to support his claim or explain how he was prejudiced by this asserted error, the court correctly denied relief. Clark also claims trial counsel should have requested a change of judge because Judge Johnson, the trial judge, had presided over a previous matter involving Clark. He contends there is a “reasonable probability” his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., would have been granted if a different judge had ruled on it. Because Clark does not point to any evidence in the record to support the allegation that Judge Johnson was in any way biased against him, the trial court correctly denied relief on this claim.

¶6 Clark also argues trial counsel should have filed a motion to preclude the testimony of his wife, Darlene, who admitted she had participated in acts of sexual abuse against the victim, who was her daughter. He asserts the jury was more inclined to believe Darlene because she testified against her own interest. However, Clark does not suggest there were any grounds for a motion to preclude Darlene’s testimony, or that it might have been granted. Rather, he merely asserts counsel should have filed it. Clark has not shown counsel’s performance fell below an objective standard of reasonableness or that the outcome at trial would have been different if counsel had filed the motion. We therefore find no abuse of discretion in the trial court’s denial of this claim.

¶7 Finally, Clark argues trial counsel should have challenged the state’s failure to retrieve evidence from the victim’s clothing, claiming “it is reasonably probable that [he] would not have been found guilty” if counsel had done so. Although Clark contends “[p]olice reports mentioned the existence of the skirt the victim wore during the alleged sexual acts,” he did not provide on review or below any citations to the record to support this contention. *See* Ariz. R. Crim. P. 32.5 (legal and record citations required in petition for post-conviction relief). In fact, the only evidence Clark provided to support this argument in the petition filed below was the following statement: “Notably, the State lost items, such as, the victim’s skirt worn during the various sexual acts.” Accordingly, the trial court correctly concluded Clark had failed to raise a colorable claim of ineffective assistance of counsel on this claim.

¶8 Because we conclude the trial court did not abuse its discretion by denying post-conviction relief, we grant the petition for review but deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge